SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2001-090769 03/18/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

TPS INC ROBERT E MELTON

v.

JAINWAY C SELINE, et al. ADAM P WEBER

NORTH MESA JUSTICE COURT
REMAND DESK CV-CCC

MINUTE ENTRY

This Court has jurisdiction of this civil appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the Trial Court, exhibits made of record and the Memoranda submitted.

In the case at hand, Appellant entered into a lease agreement with Appellee, in July 1998, whereupon Appellee would occupy a single-family residence, at $1,075.00 per month, through February 2000. The record shows that Appellee failed to make the February 2000 rent payment, permitted an unauthorized occupant to reside in the home, and damaged the residence. The residence was in such a state that Appellant could not rent it out immediately; the repairs took nearly two months to complete. Consequently, Appellee breached the lease agreement. Appellant appeared before the North Mesa Justice Court on February 18, 2000, seeking $9,649.51 in damages. The Justice Court disallowed evidence of back rents, and held that the repairs constituted a 'remodel" of the home, though no such evidence was proffered, nor such claims made before the court. Also, the Justice Court granted a judgement for Appellant in the amount of $2,750.00, offering no explanation for how it arrived at such a figure. The Justice Court also awarded attorney's fees to Appellant with a $500 limit. However, no affidavit of attorney's fees and costs was presented to the justice court. The appellant now comes before this court.

The first issue to be addressed is whether the Justice Court improperly precluded evidence of back rents. As a matter of law, a landlord is entitled to lost rents while restoring the premises to its original condition if the tenant failed to return the premises in such condition.[1] Further, the language of the special detainer judgment action issued by the Justice Court stated: "This judgment does not reflect or contain any damages incurred before or after that date (March 9, 2000) which may be litigated in a separate action between the parties…." Thus, Appellant was led to reasonably expect the opportunity to seek additional rents from Appellee beyond the date stated in the special detainer judgment. Further, Appellant correctly argues that A.R.S. §33-1377 limits the amount of rent that can be awarded under a special detainer action to those rents due at the time the judgment is entered. Therefore, it was impossible for Appellant to have utilized the special detainer action to recover damages for March and April 2000 rents due and owing. Clearly, the Justice Court erred by improperly precluding evidence of back rents.

The second issue is whether the justice court made findings that were not supported by the record, thereby improperly limiting Appellant's damages. This issue of unsupported findings concerns the sufficiency of evidence. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[2]

All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[3] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the judgment and against the Appellant.[4] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[5] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[6] The Arizona Supreme Court has explained in *State v. Tison*[7] that "substantial evidence" means:

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[1] *SDR Associates v. ARG Enterprises, Inc.*, 170 Ariz. 1, 4, 821 P.2d 268, 271 (Ariz.App. 1991).
[2] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).
[3] *Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[4] *Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[5] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[6] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[7] SUPRA.

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[8]

The issue of whether the justice court applied the correct measure of damages is a mixed question of fact and law, and is reviewed *de novo*.[9] The record shows that the Justice of the Peace was the only one that used the term "remodel." The Justice of the Peace further stated that that the carpet did not need to be replaced with tile, nor did foam need to be used in the repairs. Interestingly, the tile was less expensive than the carpet, thus mitigating the damages. The record shows confusion by the trial court as to the definition and use of foam. The Trial Court's findings are not supported by the record, and accordingly, must be reversed on appeal.

The final issue is whether the Justice Court properly considered and awarded Appellant's attorney's fees and costs, given the fact that the Justice Court never asked for an affidavit supporting such fees and costs. The lease agreement stated that prevailing party would pay all attorney's fees and costs without limitation. The law is clear concerning contractual clauses concerning attorney's fees and costs: contracts for payment of attorneys' fees and costs are enforced in accordance with the terms of the contract.[10] The Justice Court was obliged by the contract to assess reasonable attorneys' fees and costs in favor of the enforcing party.[11] However, as a prerequisite to any order for attorneys and/or costs, the trial court must review a sworn affidavit from counsel or receive evidence in some form, as to the amount of attorney's fees and the basis for the rate of attorneys fees billed. This record fails to show any basis for the Trial Court's attorney's fees order.[12]

IT IS THEREFORE ORDERED reversing the decision of the North Mesa Justice Court.

IT IS FURTHER ORDERED remanding this matter back to the North Mesa Justice Court for a new trial, and all further and future proceedings, with the exception of attorney's fees and costs on appeal.

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[8] Id. at 553, 633 P.2d at 362.

[9] *SDR Associates*, 170 Ariz. at 2, 821 P.2d at 269; *TovreaLand & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 114, 412 P.2d 47, 51 (1966).

[10] *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 565 P.2d 207 (Ariz.App. 1977); *Kammert Brothers Enterprises v. Tanque Verde Plaza Co.*, 4 Ariz.App. 349, 370, 371, 420 P.2d 592, 613 (1966); *Also see* 25 C.J.S. Damages §50(c).

[11] *Heritage Heights Home Owners Ass'n*, 115 Ariz. at 334, 565 P.2d at 211.

[12] See, A.R.S. Section 12-341.01(c).

IT IS FURTHER ORDERED that counsel for Appellant submit and lodge its Application and Affidavit for Attorney's Fees and Costs on appeal with a form of order by April 16, 2003.